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Supreme Court, U.S.
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No. 96-428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VIRGINIA WELLER

Petitioner,

v.

CITATION OIL & GAS CORPORATION, et al.

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

DOUGLAS E. HAMEL
SUZANNE LEHMAN JOHNSON
2839 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2036 (Telephone)
(713) 615-5388 (Telecopy)

Attorneys for Respondent

Of Counsel:

VINSON & ELKINS, L.L.P.
First City Tower
Houston, Texas 77002-6760

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QUESTION PRESENTED FOR REVIEW

Whether offering a religious article to a female employee on a single occasion can constitute hostile environment sexual harassment in circumstances where the supervisor's conduct was otherwise unremarkable, the company took prompt action to insure that no similar incidents would occur in the future, and the female employee suffered no adverse job consequence as a result of the incident or her complaint concerning the incident.

LIST OF PARTIES TO THE PROCEEDINGS

A. Petitioner (Plaintiff-Appellee below) — *Virginia Weller,* domiciled in Houston, Harris County, Texas.

B. Respondent (Defendant-Appellant below) — *Citation Oil & Gas Corp.,* domiciled in Houston, Harris County, Texas, with projects in various states.

C. *Ralph Hollingshead* — A party to the proceeding below. Hollingshead, Plaintiff's former supervisor, was originally sued individually by Plaintiff for sexual harassment under Title VII and intentional infliction of emotional distress under Texas state law. The Fifth Circuit reversed and rendered in Hollingshead's favor on both issues. In her Petition for Certiorari, Plaintiff has not appealed the Fifth Circuit's decision on her state law claim for intentional infliction of emotional distress as to Hollingshead or any other party. Further, with regard to Title VII sexual harassment, Plaintiff has not appealed the Fifth Circuit's decision on the issue of Hollingshead's individual liability. Thus, Hollingshead's interests will not be directly affected by the Court's decision on Plaintiff's Petition for Certiorari.

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OPINION BELOW

Weller v. Citation Oil & Gas Corp., 84 F.3d 191 (5th Cir. 1996) (reprinted in Appendix A to this brief).

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered judgment in favor of Respondent Citation Oil & Gas Corp. on June 3, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 2000e-2. Unlawful employment practices

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Virginia Weller ("Petitioner" or "Weller") sued Citation Oil & Gas Corp. ("Citation") and Ralph Hollingshead ("Hollingshead"), for hostile environment sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended, and intentional infliction of emotional distress under state law. R. Tab 1. Accepting the jury's verdict, the district court entered judgment against Defendants on all claims. R. Tab 39, App. 4. On appeal, the Fifth Circuit reversed the verdict and rendered judgment for Defendants, concluding that the isolated incident alleged by Weller, did not, in the context of the surrounding circumstances, create a hostile work environment in violation of Title VII or constitute intentional infliction of emotional distress. *Weller* v. *Citation Oil & Gas Corp.*, 84 F.3d 191, 194-95 (5th Cir. 1996).[1]

Petitioner's statement of the case omits key facts relied on by the Fifth Circuit in its decision. Specifically, and as set forth in more detail below, Petitioner fails to include the following undisputed evidence:

(1) The Spirit of Jezebel article was an isolated incident in an otherwise satisfactory work relationship. 84 F.3d at 194 n.5; Tr-2 at 20-28, 75-87; Tr-3 at 23;

(2) Weller's supervisor, Ralph Hollingshead, was reprimanded almost immediately following her first (and only) report of the incident. 84 F.3d at 194; Tr-2 at 132-33; Tr-4 at 77-85; and

(3) Weller was assured that no further incidents would occur if she returned to work. 84 F.3d at 194; Tr-2 at 139.

These omissions are particularly misleading in light of this Court's requirement, as set forth in *Harris*[2] and upon which the Fifth Circuit reached its decision, that the determination whether an environment is hostile or abusive in violation of Title VII depends on the totality of the circumstances. 84 F.3d at 194.

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[1] The Fifth Circuit opinion is reprinted in Appendix "A" to this brief.

[2] *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 370, 126 L.Ed.2d 295 (1993).

As noted by the Fifth Circuit, Weller worked as a Contract Administrator in Citation's Contract and Marketing Department for almost two years. The department consisted of Weller, another female employee and their supervisor, Hollingshead. *Id.* at 193; Tr-2 at 77. Through Weller's work monitoring natural gas stored in the El Paso Natural Gas Pipeline, Weller discovered that Citation owned a quantity of gas which was not reflected in Citation's records.[3] Before completing a memorandum to Hollingshead regarding her discovery, Weller spoke with a friend, who was the Executive Vice President's secretary, and authorized her to tell the Executive Vice President about the gas. When the Executive Vice President telephoned Hollingshead to discuss the discovered gas, Hollingshead was "caught off guard" and was unprepared to explain the status of the gas. *Id.* Hollingshead's supervisors reprimanded him, and in turn, Hollingshead reprimanded Weller for ignoring proper channels. According to Weller, the reprimand was unnecessarily harsh. During the next four days, Weller testified that Hollingshead seemed angry and did not speak to her. *Id.*; Tr-2 at 20-27, 86-95; Tr-3 at 109-111.

Weller conceded at trial that it was wrong for her to ignore procedural channels by authorizing her friend to convey departmental information directly to Hollingshead's supervisor before informing Hollingshead. Tr-2 at 92-94. Weller further conceded that it was appropriate for Hollingshead to reprimand her. *Id.* Finally, Weller does not claim that Hollingshead ever mentioned her sex in connection with the reprimand or that he used any foul or inappropriate language in the reprimand *or at any other time* during her employment. *Id.*

Shortly thereafter, Hollingshead loaned Weller a religious children's book about angels. Weller testified that she was glad they were speaking again. Upon returning the book the next day, Weller told Hollingshead that the book presented a "unique thought" on the subject of angels. Weller testified at trial that she was not

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[3] Weller admitted at trial that she knew that others were aware of the gas prior to her "discovery" and that others had been tracking the gas for some time. Tr-2 at 87-90.

offended by this book. 84 F.3d at 193 n.1; Tr-2 at 26-27, 96-98; Tr-3 at 25. Hollingshead and Weller proceeded to have a short conversation about the death of John the Baptist, and how a woman, possessed with a spirit called "Jezebel," danced when John the Baptist was beheaded. Hollingshead then gave Weller some excerpted chapters from *The Three Battlegrounds,* a book by Francis Frangipane. According to Weller, she felt "anger" and "coldness" coming from Hollingshead when he handed her the article. As he handed her the material, Hollingshead stated "the Spirit of Jezebel is alive today." 84 F.3d at 193; Tr-2 at 27-28, 99-117.

The excerpted material Hollingshead gave Weller contained an intense religious diatribe concerning the "Spirit of Jezebel," a "controlling" and "manipulative" spirit bent on "corrupting" society and turning it away from a fundamentalist understanding of the teachings of Christ. According to the excerpt, the Spirit of Jezebel "is without gender," yet prefers to work through women because of the "uniqueness of the female psyche in its ability to manipulate without physical force." 84 F.3d at 193. The article states, "let us recognize that this demon can also operate through men. In fact, Jezebel seeks the highly refined qualities of the professional musician . . ." The article continues that the spirit "flows unhindered throughout the entertainment industries. It flaunts itself in the world of fashion; it holds degrees in the philosophical departments of our schools and colleges." *Id.* at 193 n.3. The excerpt encourages its readers to "do battle" against the Spirit of Jezebel in order to maintain a fundamentalist Christian order. *Id.* at 193; *see also* a complete copy of the article, attached to the brief submitted by Citation to the Fifth Circuit as Appendix A.

Weller testified that she was deeply offended by the excerpt's contents. *Id.;* Tr-2 at 40-41. Some of the sections of the article that she identified as most offensive, however, are direct quotes from the Bible. Tr-2 at 102, 109-16. She further testified that she believed that Hollingshead intended the material as a comment on her assertiveness at work. 84 F.3d at 193; Tr-2 at 40-41.

Three weeks later, after consulting an attorney, Weller concluded that she could no longer work with Hollingshead. *Id.* at 193-94; Tr-2 at 123-24. She complained to Bob Teague, Senior Vice President of Finance and Administration. It is undisputed that Citation's investigation was initiated within 24 hours of Weller's complaint to Teague. Tr-2 at 47. Moreover, Weller described Teague's reaction to her complaints as "kind" and "very supportive." Tr-3 at 35. Teague expressly told Weller that "I know it [offensive conduct] goes on in some companies, but it will not go on in this company. It will be taken seriously." Tr-2 at 46-47. Weller was contacted by the company president, Eddie Harrell, shortly after her discussion with Teague. Tr-2 at 129-30. As a result of their investigation, Citation officials reprimanded Hollingshead but were unable to transfer Weller because of the small size of her department, the specialized nature of her work, and the relatively small size of the company (only 175 employees). 84 F.3d at 194; Tr-2 at 130-36. Weller testified that she realized that there were no other similarly compensated positions for which she was qualified and that were open at that time. Tr-2 at 131-32. In addition, Weller conceded that she could not perform her job without supervision. *Id.* Following their investigation, Citation officials told Weller that they had spoken to Hollingshead and anticipated no further problems if she would return to work. 84 F.3d at 194; Tr-2 at 139.

It is undisputed that the Jezebel article excerpt was an isolated incident in an otherwise satisfactory work relationship. *Id.* at 194 n.5. Prior to the incident, Weller does not claim that sex was ever implicated in her working relationship with Hollingshead. Tr-2 at 20-28, Tr-3 at 23. To the contrary, Plaintiff testified at trial that she thought of her position as a "good job," and she "enjoyed the job." Tr-2 at 20, 78-79. The evidence at trial further showed that Weller received a good evaluation from Hollingshead, which praised her performance and formed the basis for a salary increase, increasing Weller's annual compensation $2,000 to $39,500. Tr-2 at 80-81. Furthermore, Weller admits that Hollingshead seemed pleased with her work. Tr-2 at 82. Finally, Plaintiff Weller was given progressively greater responsibility throughout her almost

two years of employment under Hollingshead's supervision. Tr-2 at 83.

Despite her own previous experience with Hollingshead and Citation's assurances, Weller refused to return to work. After several weeks of negotiations (during which Weller was not required to report to work but received full pay), she resigned. 84 F.3d at 194; Tr-2 at 128, 141-42. Weller then filed suit.

ARGUMENT

I. THE DECISION OF THE FIFTH CIRCUIT IS CONSISTENT WITH SUPREME COURT AUTHORITY REQUIRING EXAMINATION OF THE TOTALITY OF THE CIRCUMSTANCES

Actionable hostile environment sexual harassment requires proof that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently pervasive to alter the conditions of the victim's employment and create an abusive working environment . . .' " *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993). Liability for a hostile environment does not extend to conduct that is merely offensive. 114 S. Ct. at 371. The " 'mere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII." *Id.* at 370 (citing *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986)).

In this case, the Fifth Circuit correctly determined that:

> In order to be actionable . . . the challenged conduct must create an environment that a reasonable person would find hostile or abusive. Whether an environment is hostile or abusive depends on a totality of circumstances, focusing on factors such as the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance . . . . [T]he 'mere utterance of an . . . epithet that engenders offensive feelings in an

> employee' is insufficient, without more, to support Title VII liability.

Weller, 84 F.3d at 194 (citing *Harris* and quoting *Meritor*) (citations omitted).

Applying the standard articulated in *Harris*, the Fifth Circuit correctly determined that, in Weller's case, the single incident of conduct alleged amounted to no more than "an offensive utterance." *Weller*, 84 F.3d at 194-95. While Petitioner now argues that the religious article somehow posed a threat to her physical safety, there is no record evidence in support of this subjective belief. Furthermore, the key facts that Petitioner chose to omit from her recitation of the facts provide ample support for the Fifth Circuit's conclusion that, taking into account "all of the circumstances," Weller was not subjected to a hostile or abusive work environment. As the Fifth Circuit emphasized, there was no evidence that the single religious article unreasonably interfered with Weller's performance. To the contrary, the undisputed evidence showed that:

1. The Jezebel article excerpt was an isolated incident in an otherwise satisfactory work relationship (Tr-2 at 20-28, 78-83; Tr-3 at 23);

2. Citation officials reprimanded Hollingshead for giving the religious article to Weller (Tr-2 at 130-36); and

3. Citation officials assured Weller that no further problems would occur if she returned to work (Tr-2 at 139).

Under this standard, expressly calling Weller a "Jezebel" on a single occasion is insufficient to support actionable hostile environment sexual harassment. Clearly then, implied name calling (as alleged by Weller) cannot constitute actionable sexual harassment.

Petitioner attempts to recast the Fifth Circuit's opinion by focusing on her subjective beliefs, ruminations, and conclusions regarding the single incident alleged. *See, e.g.*, Petition for Cert. at 9 ("She testified she *thought* Hollingshead had directed the article against her personally"), 10 ("Weller *believed* that Hollingshead intended the material as a comment on her assertiveness at work") (emphasis added). Such subjective criteria cannot and should not

displace the analysis mandated by this Court in *Harris*.[4] In *Harris*, this Court emphasized that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview." 114 S. Ct. at 370. The determination of whether an environment is objectively hostile or abusive requires examination of "all the circumstances," including the factors specifically enumerated in *Harris*: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*

Because Petitioner's evidence could not satisfy any of the other factors enumerated in *Harris*, it was appropriate for the Fifth Circuit to discuss whether the single incident alleged "unreasonably interfered with" Weller's performance. The Fifth Circuit's citation to its opinion in *DeAngelis* is particularly appropriate because of the similar nature of the conduct alleged in the two cases and the fact that such conduct occurred in the context of what was otherwise a work environment in which the plaintiff not only was not oppressed, but received raises, promotions, and increasing responsibility. *DeAngelis* v. *El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir.), *cert. denied* 116 S. Ct. 473 (1995).

In *DeAngelis*, the plaintiff complained about articles that appeared in a newsletter of the police officers' association. In the course of thirty months, ten articles were identified as offensive by plaintiff. Four of the articles specifically referred to the plaintiff and the remainder made comments that could be viewed as derogatory to female officers in general. *Id.* at 592-95. The Fifth Circuit concluded that the articles presented by plaintiff were "the equivalent of the 'mere utterance of an . . . epithet which engenders offensive feelings in an employee'" and therefore did not constitute

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[4] Respondent recognizes that *Harris* also requires that the plaintiff subjectively perceive the environment to be abusive. However, the strength of the plaintiff's subjective beliefs concerning the conduct alleged cannot be substituted for factual conduct required under the objective prong of *Harris*.

actionable sexual harassment. *Id.* at 595 (citing *Meritor,* 477 U.S. at 67).

Similarly, the conduct cited by Weller was nothing more than a single comment made in connection with the loan of a religious article. Plaintiff's subjective interpretation that Hollingshead's comment, "the spirit of Jezebel is alive today," implied that she was "a Jezebel" or was a call to violence is not supported by the evidence. Such an incident is neither severe enough nor pervasive enough to "alter the conditions of [Plaintiff's] employment and create an abusive working environment" as required by the Supreme Court nor has Weller presented proof that any other factor identified in *Harris* is applicable to her. *Harris,* 114 S. Ct. at 371. Further, like the plaintiff in *DeAngelis,* Weller has shown no evidence that the incident alleged "unreasonably interfered with her performance." For almost two years, Plaintiff thought of her position under Hollingshead's supervision as a "good job," and "enjoyed the job." Tr-2 at 20, 78-79. She received a good evaluation from Hollingshead, which praised her performance and formed the basis for a 5.3% salary increase. Tr-2 at 80-81. Hollingshead seemed pleased with her work and she was given progressively greater responsibility throughout her employment. Most importantly, Weller did not complain to Citation until approximately three weeks after receiving the article (and after she had contacted an attorney). Tr-2 at 123-24. It is undisputed that in the three weeks following the sole occasion of which Weller complains, she continued to work with Hollingshead without any problems or any further incident. Tr-2 at 124.

II. THE CIRCUIT COURTS, INCLUDING THE FIFTH CIRCUIT, UNIFORMLY APPLY THE SAME EVIDENTIARY SUFFICIENCY STANDARD TO HOSTILE WORK ENVIRONMENT CLAIMS.

Contrary to Petitioner's assertions, the Fifth Circuit does not employ a stricter standard than that in place in other Circuits, and the Fifth Circuit has never established a *per se* rule that one harassing incident is insufficient to succeed on a hostile work environment claim. *Weller,* 84 F.3d at 194 (citing *Harris* and quoting *Meritor*) (citations omitted). Like other Circuits, the Fifth

Circuit does recognize that Title VII is intended to remedy discrimination in the workplace, not the "mere utterance of an . . . epithet which engenders offensive feelings in an employee." *Meritor,* 477 U.S. at 67; *see also DeAngelis,* 51 F.3d at 595 (discussed above). The Supreme Court's requirement that the complained of conduct do more than occasionally offend an employee has properly lead the Fifth Circuit to reject claims concerning conduct that is trivial in nature and that does not have any significant impact on the ongoing working conditions of the employee.

In examining hostile work environment discrimination claims, other circuits have consistently adhered to the Fifth Circuit's view that conduct is actionable only when it adversely affects an employee's ability to perform their job. As stated by Judge Posner, "Title VII does not prohibit sexual harassment as such, but it does prohibit discrimination, on grounds of sex, in working conditions." *McDonnell* v. *Cisneros,* 84 F.3d 256, 259 (7th Cir. 1996) (citing with approval, *DeAngelis* v. *El Paso Municipal Police Officers Ass'n). See also, Hirase-Doi* v. *U.S. West Communications, Inc.,* 61 F.3d 777, 782 (10th Cir. 1995); *Spain* v. *Gallegos,* 26 F.3d 439, 446-47 (3d Cir. 1994); *Steiner* v. *Showboat Operating Co.,* 25 F.3d 1459, 1463 (9th Cir. 1994), *cert. denied* 115 S. Ct. 733 (1995). Accordingly, there is no conflict among the circuit courts concerning the proper standard for evaluating the evidentiary sufficiency of a hostile work environment claim.

Petitioner's argument to the contrary simply fails to address the factual disparities between this case and the cases she cites. Significantly, the cases that Petitioner suggests evidence a more lenient standard than that of the Fifth Circuit all involve circumstances far more egregious than are present in this case. For example, in *Carr* v. *Allison Gas Turbine Div., General Motors Corp.,* 32 F.3d 1007 (7th Cir. 1994)(Posner, J.), the Seventh Circuit reversed a judgment for the defendant finding that the plaintiff had been subjected to a hostile work environment. The plaintiff in *Carr* was subjected to an "egregious campaign of sexual harassment" lasting approximately five years. *Id.* at 1012. Carr, the sole female employed in the defendant's tinsmith shop, endured sexually derogatory comments on a daily basis during the five years she was in that position. *Id.* at 1009-10. For example, Carr was regularly referred to as "whore,"

"cunt," and "split-tail." *Id.* at 1009. In addition to such verbal attacks, Carr's coworkers painted "cunt" on her toolbox, cut the seat out of the overalls she wore at work, stripped to their underwear in front of her, exposed themselves to her, and placed graphic and offensive signs, pictures, and graffiti in her work area. *Id.* Not surprisingly, the Seventh Circuit found that such conduct was severe and pervasive enough to have adversely affected the conditions of Carr's employment.

In contrast with the result reached in the *Carr* case, the Seventh Circuit had little difficulty reversing a jury award for the plaintiff in a hostile work environment claim when faced with facts significantly less abusive and hostile than addressed in *Carr* but significantly more problematic than those in this case. In *Baskerville* v. *Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (Posner, J.), the plaintiff complained of harassing conduct by her supervisor occurring over a seven month time frame. Such incidents included the supervisor referring to her as "pretty girl," making a grunting sound when she wore a leather skirt, and making a hand gesture suggestive of masturbation. *Id.* Although the plaintiff was able to cite nine instances in which her supervisor made comments with sexual overtones, the court nonetheless found that the supervisor's conduct did not amount to sexual harassment. The court noted, "He never touched the plaintiff. He did not invite her, explicitly or by implication, to have sex with him, or to go out on a date with him. He made no threats. He did not expose himself, or show her dirty pictures. He never said anything to her that could not be repeated on prime time television." *Id.* at 431. In comparison to the conduct rejected by the Seventh Circuit in *Baskerville*, the conduct of which Weller complains was even less egregious. The single incident cited by Weller was not ongoing, not sexually explicit, not highly derogatory, and did not occur in public. Tr-2 at 20-28, Tr-3 at 23.

The other cases relied on by Weller are similarly inapposite. In *Steiner* v. *Showboat Operating Co.*, the plaintiff was subjected to ongoing harassment that included being called "dumb fucking broad," "cunt," and "fucking cunt" by her supervisor. 25 F.3d at 1461 (9th Cir. 1994). Moreover, the plaintiff was physically threatened and publicly humiliated during one particularly egregious incident. In finding that this conduct was actionable

under Title VII, the Ninth Circuit noted that the complained of conduct was ongoing, sexually explicit, highly derogatory, and publicly made. *Id.* at 1463. The same cannot be said of this case. Weller identified only one incident in the course of almost two years of uneventful (and successful) employment — a fundamentalist religious article. There was no ongoing harassment, there were no graphic sexual remarks, and she was never touched or physically threatened. She was never publicly humiliated in any way. Tr-2 at 20-28, Tr-3 at 23.

Weller's results-oriented approach to legal analysis fails to understand that merely because cases have differing outcomes does not inexorably lead to the conclusion that differing legal standards were used. The cases cited by Weller do not involve the application of a legal standard lower than the Fifth Circuit's; they merely involve facts which are readily distinguishable from those presented by Weller due to the pervasiveness and severity of the conduct at issue.

Importantly, Petitioner fails to cite a single case in which a plaintiff has succeeded on a hostile work environment claim based on facts similar to those at issue in this case. When faced with factual scenarios more analogous to that presented in this case, the Circuits consistently find that the plaintiff failed to prove the existence of a hostile work environment. *See e.g., Hopkins* v. *Baltimore Gas and Elec. Co.,* 77 F.3d 745, 747-78, 753 (4th Cir. 1996) (male supervisor's treatment of male employee that included bumping into employee, positioning a magnifying glass over his crotch, giving employee a congratulatory kiss at employee's wedding, and several other inappropriate sexual comments did not constitute a hostile work environment; also finding that same-sex sexual harassment is not cognizable under Title VII); *Callanan* v. *Runyan,* 75 F.3d 1293, 1295-96 (8th Cir. 1996) (employee who received less favorable work assignments and training opportunities than male employees and who had periodic negative encounters with supervisors including being called a "bitch" did not establish the existence of a hostile work environment); *Bolden* v. *PRC,* 43 F.3d 545, 552 (10th Cir. 1994) (plaintiff asserting hostile work environment claim on the basis of racial harassment failed to carry burden despite being regularly referred to as "nigger" by co-

workers, being told, "you better be careful because we know people in the Ku Klux Klan" and being called numerous other vulgar names over an eight year period); *Candelore* v. *Clark County Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992) (workplace conduct including isolated incidents of sexual horseplay did not constitute a hostile work environment).

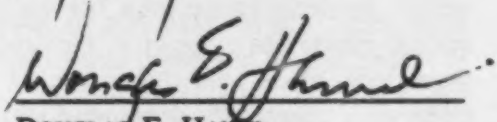
Moreover, Petitioner fails to cite a single case in which an isolated incident established a hostile work environment. Rather, in every case cited by Petitioner in which a plaintiff carried her burden of proof, the offending conduct was repetitive in nature. In addition to the continuous nature of the harassment, successful plaintiffs were typically subjected to conduct that was either physically assaultive, physically menacing, or sexually explicit. *E.g.*, *Hirase-Doi*, 61 F.3d at 781 (plaintiff was subjected to ongoing harassment including written and verbal sexually offensive remarks, attempts to touch her breasts, and being grabbed between the legs); *Beardsley* v. *Webb*, 30 F.3d 524, 528 (4th Cir. 1994) (plaintiff was continually harassed for approximately six months including touching, false accusations that she was having an extramarital affair, explicitly sexual remarks concerning her underwear and birth control, and sexual innuendos); *Spain* v. *Gallegos*, 26 F.3d 439, 442 (harassment took place over the course of several years during which a supervisor repeatedly demanded loans of money from subordinate and refused to end rumors that the two were having an affair); *King* v. *Hillen*, 21 F.3d 1572, 1573-74, 1581-82 (Fed. Cir. 1994) (harassing conduct was directed at numerous female co-workers and included touching, suggestive looks and comments, offensive jokes and propositions). That is not to say that a single incident could never suffice as sexual harassment but only that the severity of the conduct must rise to a higher level than a single religious article in order to implicate Title VII. *See Steiner*, 25 F.3d at 1463 n.4 ("the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct") (citation omitted).

CONCLUSION

It is clear that Title VII provides a remedy for individuals who are subjected to a hostile or abusive working environment. It is equally clear, however, that the Fifth Circuit correctly determined that Petitioner had failed to show that the isolated incident where her supervisor gave her a religious article converted an otherwise unobjectionable working environment into one that was violative of Title VII. This case does not merit consideration by this Court because the facts alleged by Petitioner are not typical of the facts commonly alleged in hostile work environment cases. Furthermore, the Fifth Circuit's resolution of this case, with its unique and limited facts, is unlikely to have any significant impact on future decisions in other cases.

Based upon all of the foregoing, Respondent Citation Oil & Gas respectfully requests that the Petition for Writ of Certiorari be denied in all respects.

Respectfully submitted,



DOUGLAS E. HAMEL
Texas State Bar No.: 08818300
SUZANNE LEHMAN JOHNSON
Texas State Bar No.: 00784460
2839 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2036 (Telephone)
(713) 615-5388 (Telecopy)
Attorneys for Respondent
Citation Oil & Gas Corporation

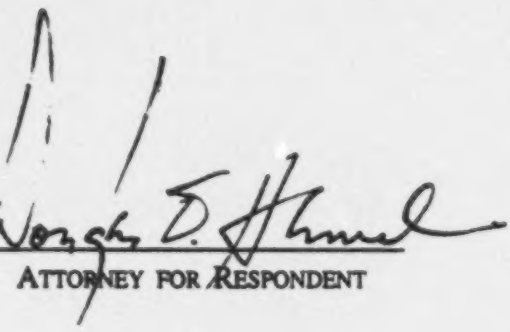
Of Counsel:
VINSON & ELKINS, L.L.P.
First City Tower
Houston, Texas 77002-6760

CERTIFICATE OF SERVICE

I certify that on this the 20th day of November, 1996, a correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been forwarded to counsel for Petitioner by placing same in the United States mail, certified, return receipt requested, with proper postage affixed and addressed as follows:

WILLIAM PANNILL
Suite 4050
Two Houston Center
Houston, Texas 77010

ELIOT TUCKER
Mandell & Wright, P.C.
712 Main Street, Suite 1600
Houston, Texas 77002-3297



ATTORNEY FOR RESPONDENT

APPENDIX A

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 94-2-439

VIRGINIA WELLER,

Plaintiff-Appellee,

v.

CITATION OIL & GAS CORPORATION,

and

RALPH HOLLINGSHEAD,

Defendants-Appellants.

June 3, 1996

Employee brought action against her former employer for intentional infliction of emotional distress and hostile work environment under Title VII. The United States District Court for the Southern District of Texas, David Hittner, J., entered judgment in favor of employee, and employer appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held: (1) fact that supervisor, who was reprimanded as result of employee's conduct, gave employees article containing religious diatribe concerning the "Spirit of Jezebel" did not create hostile work environment under Title VII, and (2) supervisor's conduct in giving the article to employee who was not sufficiently outrageous to support intentional infliction of emotional distress claim under Texas law.

Reversed and rendered.

1. **Federal Courts k799**

In reviewing case for sufficiency of the evidence, Court of Appeals considers all the evidence presented, not just evidence supporting the verdict, but in light most favorable to, and drawing all reasonable inferences in favor of, the party who obtained the verdict.

2. **Federal Courts k847**

When reviewing case for sufficiency of the evidence, Court of Appeals will reverse only if reasonable minds exercising impartial judgment could not have arrived at the verdict.

3. **Civil Rights k167**

To state claim for relief under Title VII for gender discrimination based on theory of hostile work environment, plaintiff must prove that she belongs to protected class, that she was subject to unwelcome harassment, that the harassment was based on sex, that harassment affected term, condition, or privilege of employment, and that employer knew or should have known about harassment and failed to take prompt remedial action. Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e-2.

4. **Civil Rights k167**

Sexually discriminatory verbal intimidation, ridicule, and insults may be sufficiently severe or pervasive to alter conditions of plaintiff's employment and create abusive working environment violative of Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. **Civil Rights k145**

To be actionable under Title VII, the challenged conduct must create an environment that a reasonable person would find hostile or abusive. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. **Civil Rights k145**

Whether work environment is hostile or abuse so as to violate Title VII depends on totality of the circumstances, focusing on factors such as frequency of the conduct, severity of conduct, degree to which conduct is physically threatening or humiliating, and degree to which conduct unreasonably interferes with employee's work performance. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. **Civil Rights k141**

Title VII is only meant to bar conduct that is so severe and pervasive that it destroys protected class member's opportunity to succeed in the workplace. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. **Civil Rights k167**

Fact that supervisor, who had been reprimanded as result of employee's conduct, gave employee article containing religious diatribe concerning the "Spirit of Jezebel" did not create hostile work environment in violation of Title VII, despite fact that jury could have reasonably inferred that supervisor meant the article as a retributive epithet, that supervisor was calling employee a "Jezebel" and that employee was offended by the article. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. **Civil Rights k145**

Because employee failed to present sufficient evidence to support her Title VII hostile work environment claim, her constructive discharge claim necessarily failed as well. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. **Damages k50.10**

Under Texas law, intentional infliction of emotional distress requires proof that defendant acted intentionally or recklessly, that defendant's conduct was extreme and outrageous, that defendant's actions caused plaintiff emotional distress, and that the emotional distress suffered by plaintiff was severe.

11. **Damages k50.10**

Under Texas law, conduct is "outrageous," for purposes of intentional infliction of emotional distress claim, if it surpasses all bounds of decency, such that it is utterly intolerable in a civilized community.

See publication Words and Phrases for other judicial constructions and definitions.

12. **Damages k50.10**

Under Texas law, intentional infliction of emotional distress requires evidence of conduct beyond mere insults, indignities, or petty oppressions.

13. **Damages k50.10**

Under Texas law, conduct of supervisor, who was reprimanded as result of employee's actions, in giving employee article containing religious diatribe concerning the "Spirit of Jezebel" was not sufficiently outrageous to support intentional infliction of emotional distress claim.

Appeals from the United States District Court for the Southern District of Texas.

Before GARWOOD, EMILIO M. GARZA AND DEMOSS, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Defendants Citation Oil & Gas Corporation ("Citation") and Ralph Hollingshead appeal a jury verdict awarding plaintiff Virginia Weller damages on her employment discrimination claims. We reverse.

I

Weller worked as a Contract Administrator in Citation's Contract and Marketing Department. The department consisted of Weller, her supervisor Ralph Hollingshead, and one other female employee. Through Weller's work monitoring natural gas stored in the El Paso Natural Gas Pipeline, Weller discovered that Citation owned a quantity of gas which was not reflected in Citation's records. Before completing a memorandum to Hollingshead detailing her discovery, Weller informed the Executive Vice President's secretary about the gas. When the Executive Vice President phoned Hollingshead to discuss the discovered gas, Hollingshead was "caught off guard" and was unprepared to explain the status of the gas. Hollingshead's supervisors reprimanded him, and in turn, Hollingshead reprimanded Weller for ignoring proper channels.

According to Weller, the reprimand was unnecessarily harsh. During the next four days, Weller testified that Hollingshead seemed angry and did not speak to her.

Shortly thereafter, Hollingshead loaned Weller a religious children's book about angels. Weller testified that she was glad they were speaking again. Upon returning the book the next day, Weller told Hollingshead that the book presented a "unique thought" on the subject of angels.[1] Hollingshead and Weller proceeded to have a short conversation about the death of John the Baptist, and how a woman, possessed with a spirit called "Jezebel," danced when John the Baptist was beheaded. Hollingshead then gave Weller some excerpted chapters from *The Three Battlegrounds*, a book by Francis Frangipane. According to Weller, she felt "anger" and "coldness" coming from Hollingshead when he handed her the article. As he handed her the material, Hollingshead stated "the Spirit of Jezebel is alive today."

The excerpted material Hollingshead gave Weller contained an intense religious diatribe concerning the "Spirit of Jezebel," a "controlling" and "manipulative" spirit bent on "corrupting" society and turning it away from a fundamentalist understanding of the teachings of Christ.[2] According to the excerpt, the Spirit of Jezebel "is without gender," yet prefers to work through women because of the "uniqueness of the female psyche in its ability to manipulate without physical force."[3] The excerpt encourages its readers to "do battle" against the Spirit of Jezebel in order to maintain a fundamentalist Christian order.

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[1] Weller testified that she was not offended by this book.

[2] The article states, "When we speak of Jezebel, we are identifying the source in our society of obsessive sensuality, unbridled witchcraft and hatred of male authority."

[3] The article states, "let us recognize that this demon can also operate through men. In fact, Jezebel seeks the highly refined qualities of the professional musician . . . ." The article continues that the spirit "flows unhindered throughout the entertainment industries. It flaunts itself in the world of fashion; it holds degrees in the philosophical departments of our schools and colleges."

Weller was deeply offended by the excerpt's contents. She believed that Hollingshead intended the material as a comment on her assertiveness at work. Three weeks later, after consulting an attorney, Weller concluded that she could no longer work with Hollingshead. She complained to Citation officials and requested a transfer. Citation officials made an inquiry into the incident and reprimanded Hollingshead but were unable to transfer Weller. Citation officials told Weller that they had spoken to Hollingshead and anticipated no further problems if she would return to work. After several weeks of negotiations, she resigned. Weller filed suit against Citation and Hollingshead, asserting claims for sexual harassment, constructive discharge, and intentional infliction of emotional distress. A jury found in her favor and awarded damages on all claims. Defendants now appeal the jury verdict.

II

[1,2] The defendants argue that Weller presented insufficient evidence to support the jury's verdict. In reviewing a case for sufficiency of the evidence, we consider all the evidence presented, not just the evidence supporting the verdict, but in the light most favorable to, and drawing all reasonable inferences in favor of, the party who obtained the verdict. *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (*en banc*). We will reverse only if reasonable minds exercising impartial judgment could not have arrived at the verdict. *DeAngelis* v. *El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir.), *cert. denied*, ____ U.S. ____, 116 S. Ct. 473, 133 L.Ed. 2d 403 (1995).

[3-6] To state a claim for relief under Title VII[4] for gender discrimination based on a theory of a hostile work environment, a plaintiff must prove (1) that she belongs to a protected class, (2) that she was subject to unwelcome harassment, (3) that the harassment was based on sex, (4) that the harassment affected a term, condition or privilege of employment, and (5) that the employer knew or should have known about the harassment and failed to take prompt remedial action. *Nash* v. *Electrospace System, Inc.*, 9 F.3d

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[4] 42 U.S.C. § 2000e-2.

401, 403 (5th Cir. 1993). Sexually discriminatory verbal intimidation, ridicule, and insults may be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment violative of Title VII. *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, ____, 114 S. Ct. 367, 370, 126 L. Ed.2d 295 (1993). In order to be actionable, however, the challenged conduct must create an environment that a reasonable person would find hostile or abusive. *Id.* Whether an environment is hostile or abusive depends on a totality of circumstances, focusing on factors such as the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which to which the conduct unreasonably interferes with an employee's work performance. *Id.* at ____, 114 S. Ct. at 371. We have previously noted that the " 'mere utterance of . . . epithet which engenders offensive feelings in an employee' " is insufficient without more, to support Title VII liability. *De Angelis*, 51 F.3d at 595 (quoting *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405, 91 L.Ed.2d 49 (1986)).

[7-9] Citation and Hollingshead argue that giving the Spirit of Jezebel excerpt to Weller was insufficient to support the jury's finding of hostile work environment. We agree. Title VII was only meant to bar conduct that is so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace. *DeAngelis*, 51 F.3d at 593. Viewing the evidence in the light most favorable to the verdict, the jury could have reasonably inferred that Hollingshead meant the article as retributive epithet — that Hollingshead remained angry at Weller and that he was calling her a "Jezebel."[5] We do not doubt that Weller was deeply offended by the article. However, we note that making actionable "conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of equality." *Id.* Instead, a lesser standard "would attempt to insulate women from everyday insults as if they remained models of Victorian

[5] It is undisputed that the Jezebel excerpt was an isolated incident in an otherwise satisfactory work relationship.

reticence." *Id.* Such a result is not the goal of Title VII. *Id.* We therefore hold that it was unreasonable, on the evidence presented, for the jury to find that Hollingshead's conduct created a hostile work environment.[6] Accordingly, we reverse the jury's verdict awarding Weller damages under a hostile work environment theory.[7]

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[6] In *DeAngelis*, we noted the yet unresolved dilemma facing courts adjudicating claims at the intersection of Title VII and the First Amendment:

> Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.

De Angelis, 51 F.3d at 598-99. Supreme Court precedent in this area provides little guidance concerning whether conduct targeted for its expressive content like Hollingshead's conduct in this case, may be regulated under Title VII. *See Wisconsin* v. *Mitchell*, 508 U.S. 476, 485-87, 113 S. Ct. 2194, 2200, 124 L.Ed.2d 436 (1993) (holding that conduct *not* targeted on the basis of its expressive content may be regulated under Title VII). Because we find that the evidence was insufficient to support the jury's verdict, we leave this troubling question for another day.

[7] Because Weller failed to present sufficient evidence to support her hostile work environment claim, her constructive discharge claim necessarily fails as well. *See Landgraf* v. *USI Film Prods.*, 968 F.2d 427, 429 (5th Cir. 1992), *affirmed*, ____ U.S. ____, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment."). We also need not address whether the jury properly held Hollingshead personally liable under Title VII. *See Grant* v. *Lone Star Co.*, 21 F.3d 649, 650 (5th Cir.) (refusing to hold individual, who does not qualify as an "employer" under Title VII, personally liable for creating hostile work environment), *cert. denied*, ____ U.S. ____, 115 S. Ct. 574, 130 L. Ed.2d 491 (1994). Nor need we address Citation's claim that the company took sufficient remedial steps to insulate itself from liability. *See Carmon* v. *Lubrizol Corp.*, 17 F.3d 791, 795 (5th Cir. 1994) (insulating an employer from Title VII liability where an employer takes an employee's allegations seriously, conducts a prompt and thorough investigation, and immediately implements remedial or disciplinary measures).

III

[10,11] The defendants next contest the jury's award for intentional infliction of emotional distress. Under Texas law, intentional infliction of emotional distress requires proof (1) that the defendant acted intentionally or recklessly, (2) that the defendant's conduct was extreme and outrageous, (3) that the defendant's actions caused the plaintiff emotional distress, and (4) that the emotional distress suffered by the plaintiff was severe. *Dean* v. *Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989). Conduct is "outrageous," for purposes of an intentional infliction of emotional distress claim, "if it surpasses all bounds of decency, such that it is utterly intolerable in a civilized community." *Ugalde* v. *W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993) (internal quotations marks omitted). We have previously stated, in affirming summary judgment for a defendant on an intentional infliction of emotional distress claim, "Liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions." *Id.* at 243.

[12,13] Citation and Hollingshead argue that the evidence was insufficient to support Weller's claim of intentional infliction of emotional distress. After carefully reviewing the evidence in the light most favorable to the verdict, we conclude that Weller presented insufficient evidence to support the jury's verdict for intentional infliction of emotional distress. The Jezebel excerpt may have been hurtful and offensive, but intentional infliction of emotional distress requires evidence of conduct beyond mere insults, indignities, or pretty oppressions. *Id.* Weller failed to present such evidence. Therefore, it was unreasonable for the jury to conclude that Hollingshead's conduct was sufficiently "outrageous" to support an intentional infliction of emotional distress claim. See *Ugalde*, 990 F.2d at 243 (holding employer's repeated references to an Hispanic employee as "wetback" insufficiently outrageous and extreme to support a claim for intentional infliction of emotional distress). Accordingly, we reverse the jury's verdict on Weller's claim of intentional infliction of emotional distress.[8]

IV

For the foregoing reasons, we REVERSE and RENDER judgment in favor of the defendants.

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[8] Having reversed the jury's verdict in total, we need not address defendants' other points of error.